IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 264 OF 2002

IN

MISCELANEOUS PETITION NO. 83 OF 2000

IN

PROBATE PETITION NO. 157 OF 2000

Smt. Ragini Narayan ... Appellant
(Org.Respondent)

Vs.

Smt. Minnie Narayan ... Respondent
(org. petitioner)

Mr. B.B.Saraf with Mr. S.P.Dalal i/b. Dalal & Co. for the appellant.

Mr. P.N.Patwardhan with S.B.Shenoy for Respondent.

CORAM: D.K.DESHMUKH &
J.H.BHATIA,JJ.

DATE: 15th October,2007.

P.C.

1. By this Appeal, the appellant challenges the order dated 27.9.2001 passed by a learned Single Judge of this Court in Misc. Petition No.83 of 2000.

2. The facts relevant for deciding this Appeal are:-

That one B.M.Srinivasaiah, who expired on 15.9.1953, was married to one Lakshamma. Srinivasaiah and Lakshamma had a son by name B.S.Narayan. His first wife was one Minnie Narayan. Admittedly, she was divorced and then he married Ragini. Lakshamma expired on 1.9.1999. Ragini filed Probate Petition No.157 of 2000 for probate of the Will left behind by Lakshamma. The Court granted probate of that Will by an order dated 17.5.2000. Minnie filed Misc. Petition No.83 of 2000 for revocation of the probate granted of the Will of Lakshamma. The petition for revocation of probate was filed by Minnie on the ground that one of the properties disclosed in the Will of Lakshamma as the property belonging to deceased Lakshamma is actually the property owned by Minnie and not by Lakshamma. According to Minnie, Ragini who had filed the petition for probate was aware of this. Still, she suppressed that fact in the probate petition that was filed by her and, therefore, the probate should be revoked. The learned

Single Judge has held that as Ragini knew that the property is actually owned by Minnie, it was her duty to disclose that fact to the Court when she filed Probate Petition and, therefore, according to the learned Judge, it was just cause for revocation of the probate.

3. Learned Counsel appearing for the appellant/original petitioner - Ragini submits that firstly, as Minnie was not and does not claim to be the next-of-kin of deceased Lakshamma, in view of the provisions of Rule 397 of the High Court (Original Side) Rules, it was not necessary for the petitioner - Ragini to cite her in the Probate Petition. The learned Counsel relies on a Judgment of a learned Single Judge of this Court in the case of **Bai Parvatibai vs. Raghunath Lakshman, AIR 1941 Bom.60** as also the observations in the Judgment of the Supreme Court in the case of **Ishwardeo Narain Singh vs. Kamta Devi & Ors. reported in AIR 1954 SC 280 and another** judgment of the Supreme Court in the case of **Chiranjilal Shrilal Goenka (deceased) through L.Rs vs. Jasjit Singh & Ors. (1993) 2 SCC 507.** Learned Counsel submits that recently a Division Bench of this Court in its judgment in the case of **Thrity Sam Shroff vs. Shriraz Byramji Anklesaria & anr. 2007(2) Bom.C.R. 560** has followed both the judgments and held that in a probate petition title to the property of the deceased is not decided and,

therefore, there was no duty cast on Ragini-petitioner to disclose even if it is assumed that she knew that some of the properties mentioned in the Will are not owned by the testator, that those properties according to her are not owned by the testator and disclose the names of the persons who, according to her, are the owners of the property. Learned Counsel submits that the petitioner could have been charged with concealment of facts only if there was a duty to disclose those facts imposed on her by law. As the subject matter of the probate petition was only the Will and not the property mentioned in the Will, there was no duty on the petitioner to disclose anything about the ownership of the property and, therefore, it cannot be said that the petitioner was guilty of concealment of any facts. According to him, the learned Judge was not justified in revoking the probate.

4. Learned Counsel appearing for the respondent, on the other hand, submits that it is clear that the deceased had no title to the property. Ragini was aware of it and, therefore, it was the duty of Ragini to disclose to the Court these facts. He submits that Ragini is guilty of suppressing facts from the Court.

5. Now, it is clear from the judgment of the learned Single Judge of this Court which is reported in

AIR 1941 Bom.60 (cited supra) that a testamentary Court dealing with the question of issuing a grant of probate is concerned to see whether the will is duly executed as required by law by a testator of sound and disposing state of mind. It is no part of the duty of the Testamentary Judge to consider the question of title to property. The learned Judge has held that a caveat cannot, therefore, be sustained on the mere ground that the property which is attempted to be disposed of by the deceased by the will are not the property of the deceased, but the properties of the caveator. The learned Judge has held that the remedy of such a caveator is to file a civil suit to establish title. We are in respectful agreement with the view taken by the learned Single Judge in the case of Bai Parvatibai. We find that the same law has been laid down by the Supreme Court in the case of Ishwardeo Narain Singh vs. Kamta Devi & Ors. as also in the case of Chiranjilal S. Goenka. As the Probate Court does not consider the question of title of the deceased to the property mentioned in the Will, there was no duty cast on Ragini-petitioner to disclose to the Court even assuming that she knew that the deceased was not the owner of a part of the property disclosed in the Will that fact. Grant of probate in favour of Ragini of the Will of deceased which disclose the property to which Minnie lays her claim does not make Ragini owner of the

property. The question whether Minnie is the owner of the property or deceased was the owner of the property will be decided only by the Civil Court which is the only Court competent to make declaration about title to the property. No other Court including a Testamentary Court has that jurisdiction and, therefore, in our opinion, the learned Single Judge was not justified in holding that Ragini is guilty of suppressing facts from the Court. In our opinion, Minnie ion the basis of her claim to property of the deceased did not have any caveatable interest and, therefore, she could not have been cited as the next-of -kin. She had no caveatable interest. Therefore, she could not have filed the caveat and, therefore, at her instance, the probate granted should not have been revoked. The order of the learned Single Judge impugned in the Appeal revoking probate granted in favour of Ragini passed in Misc. Petition No.83 of 2000 at the instance of Minnie therefore, is liable to be set aside.

6. In the result, therefore, the Appeal succeeds and is allowed. The order dated 27.9.2001 passed by the learned Single Judge in Misc. Petition No.83 of 2000 is set aside.

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(D.K. DESHMUKH,J.)

(J.H.BHATIA,J.)